

**Symbol Key**

Roman type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text. Language which is ~~stricken~~ through indicates text being deleted.

**Proposed Regulations**

Under 29 Del.C. §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the *Register of Regulations* pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the *Register of Regulations*. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation. The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

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**DELAWARE RIVER BASIN  
COMMISSION****PUBLIC NOTICE****Proposed Amendment to the Basin Regulations--Water  
Supply Charges and Comprehensive Plan Relating to  
Certificates of Entitlement**

**Summary:** The Delaware River Basin Commission ("Commission" or "DRBC") will hold a public hearing to receive comments on proposed amendments to the Commission's *Basin Regulations - Water Supply Charges and Comprehensive Plan* concerning certificates of entitlement. No changes in the substance or administration of the rule are proposed. The purpose of the proposed amendments is to clarify the language of the rule to conform to the Commission's past decisions and current practices in order to provide better notice to users as to how the Commission is implementing its entitlements program and to avoid future controversy.

**Background.** The Delaware River Basin Compact ("Compact"), the 1961 statute that created the DRBC and defined its powers, authorizes the Commission to charge for the use of facilities that it may own or operate and for products and services rendered thereby. Compact, §3.7. Congress limited this authority by providing that the Commission cannot charge for water withdrawals or

diversions that could lawfully have been made without charge as of the effective date of the Compact. Id., § 15.1(b).

By Resolution No. 64-16A in 1964 the Commission authorized a water charging program. It provided for the revenues generated by the program to be used for repayment of the nonfederal share of the investment cost of water supply storage facilities associated with federal projects within the Basin. In anticipation of Commission investment in storage at the Beltzville Lake and Blue Marsh Reservoir projects in Pennsylvania, the Commission by Resolution No. 1971-4 defined, among other things, the means by which it would establish water charging rates. Consistent with Section 15.1 (b) of the Compact, Resolution No. 1971-4 provided that charges would be applicable only to the amount of water withdrawn in excess of the amount taken or legally entitled to be taken by an entity during the preceding year. By Resolution No. 74-6, the Commission instituted a system of water supply charges for surface water withdrawals within the Basin. That resolution provided for the issuance of certificates of entitlement to then-current water users, establishing the amount of water each could lawfully take from the surface waters of the Basin without charge, consistent with Section 15.1(b) of the Compact. The resolution provided that a certificate of entitlement was not transferable, except under limited circumstances set forth in enumerated exceptions.

Because entitlements treat users that commenced water withdrawals before the enactment of the Compact more favorably than users who commenced water withdrawals later, even though all users benefit equally from the facilities

financed by water supply charges, courts and the Commission have emphasized the need to eliminate entitlements over time. Both the Commission and the courts have construed narrowly the exceptions to the rule that entitlements are not transferable, and the Commission has in its decisions consistently held that changes in ownership or control would extinguish a certificate. However, the language of the regulations has never explicitly defined "changes in ownership or control." As a consequence, in the decisions that the Commission has been asked to make in its adjudicatory capacity and that the courts have subsequently been asked to decide, the matter of what constitutes a change of ownership or control has been controversial.

In 1994, in response to a ruling by the Third Circuit in Texaco Refining and Marketing, Inc. v. DRBC, 824 F. Supp. 500 (D.Del. 1993), *aff'd.*, No. 93-7475 (3d Cir. June 24, 1994) (*per curiam*), the Commission adopted Resolution No. 94-20. That resolution incorporated an explicit "ownership and/or control" test and eliminated the merger exception included in the Commission's regulations at the time. In addition, the exception for corporate reorganizations embodied in Section 5.2.1.F.2 of the Water Charging Regulations was amended to apply only when the reorganization "does not affect ownership and/or control."

In spite of the 1994 amendment, some members of the Basin community have continued to interpret the language of the rule in a manner contrary to the Commission's consistent interpretation. To avoid further controversy, the Commission proposes a more thorough revision of the language, intended to remove any ambiguity.

**Key Provisions.** In addition to defining "change in ownership and/or control" with much greater specificity, the proposed revisions also make clear that a merger at any tier in a corporate organization will extinguish a certificate held by a subsidiary in the same way as if the merger had occurred at the subsidiary level. Although the Commission has interpreted its rule this way in the past, the rules have never been explicit on this point.

The proposed amendments preserve and clarify the corporate reorganization exception contained in the current regulation. The Commission traditionally has not extinguished an entitlement in the case of an internal reorganization, and it does not propose a change in this practice.

The proposed amendments also preserve the existing exception for agricultural uses. Historically, agriculture has been treated differently than other uses. For purposes other than agriculture, an entitlement is issued to a user and would not be transferable to a different user, even if the use remained the same. In the case of agriculture, however, an entitlement effectively runs with the land, as long as the land

remains in agriculture. The proposed amendments provide that an entitlement can be reissued to the successor of a holder of a certificate issued for agricultural water use, provided that the successor demonstrates that the water will continue to be used for agricultural irrigation purposes.

**Dates:** The public hearing on the proposed rule change will be held on Wednesday, December 7, 2005 at approximately 2:30 P.M. as part of the Commission's regularly scheduled business meeting. The time is approximate because the Commission will conduct hearings on several dockets (project approvals) beforehand, beginning at approximately 1:30 P.M. The hearing will continue until all those who wish to testify are afforded an opportunity to do so. In the event that all those who wish to testify cannot be heard on December 7, the hearing will be continued at a date, time and location to be announced by the Commission Chair that day. Persons wishing to testify at the hearing are asked to register in advance with the Commission Secretary by phoning 609-883-9500, extension 224. Written comments will be accepted through Tuesday, January 10, 2006.

**Addresses:** The public hearing will be held in the Goddard Room at the Commission's office building, located at 25 State Police Drive in West Trenton, New Jersey. Directions to the Commission's office building are posted on the Commission's website, <http://www.drbc.net>. Written comments should be addressed to the Commission Secretary as follows: by email to [paula.schmitt@drbc.state.nj.us](mailto:paula.schmitt@drbc.state.nj.us); by fax to the Commission Secretary - 609-883-9522; by U.S. Mail to the Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360; or by overnight mail to the Commission Secretary, DRBC, 25 State Police Drive, West Trenton, NJ 08628-0360.

**Additional Information, Contact:** The full text of the proposed amendment and the text of the current regulation are posted on the Commission's website, <http://www.drbc.net>. Please contact Commission Secretary Pamela Bush at 609-883-9500 ext. 203 with questions about the proposed rule or the rulemaking process.

Pamela M. Bush, Esquire  
Commission Secretary and Assistant General Counsel  
October 12, 2005

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